NO. 94-1237

FILED
FEB 16 1995

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

KEYSTONE CHAPTER,
ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
in representation of its members,
Petitioner,

v.

JOHNNY J. BUTLER,
in his official capacity as
Acting Secretary of Labor and Industry
for the Commonwealth of Pennsylvania,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania

By: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

SUSAN J. FORNEY
Senior Deputy Attorney General
Counsel of Record

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717)783-1471

QUESTION PRESENTED

Whether Pennsylvania's Prevailing Wage Act relates to employee benefit plans in more than a "tenuous, remote and peripheral manner" and therefore is pre-empted by ERISA?

LIST OF PARTIES

The parties listed in the petition for certiorari are accurate except that respondent Thomas P. Foley, Pennsylvania's Secretary of Labor and Industry has been succeeded in that office by Acting Secretary Johnny J. Butler, who should be substituted as respondent. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT.....	11
I. THE PETITION DOES NOT PRESENT AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE IN CONFLICT....	11
II. THE ISSUE PRESENTED BY THE PETITION WILL HAVE NO IMPACT ON THE LAW OF ERISA PRE-EMPTION BEYOND THE FACTS OF THIS CASE.....	17
III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.	19
CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases: Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)..... 12

District of Columbia v. Greater Washington Board of Trade, 506 U.S. __, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992)..... 9,23

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)..... 19,20

General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2d Cir. 1989)...11,12,13 14,17,18

Lycoming County Nursing Home v. Pennsylvania, 627 A.2d 238, (Pa. Commw. Ct. 1993)..... 2

Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988)..... 7

Massachusetts v. Morash, 490 U.S. 107 (1989)..... 19,20

National Elevator Industry, Inc. v. Calhoon, 957 F.2d 1555(10th Cir.1992). 18

Cases: Page

New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 14 F.3d 708 (2d Cir.), cert. granted, 63 U.S.L.W. 3291 (1994)..... 14

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)..... 6,9,21

Statutes:

Employee Retirement Income Security Act, (ERISA)
29 U.S.C. §1003(b)(3)..... 22
29 U.S.C. §1141(a)..... 1

Pa. Stat. Ann., tit. 43, §165-1... 1
Pa. Stat. Ann., tit. 43, §165-5... 2
Pa. Stat. Ann., tit. 43, §165-7... 2
Pa. Stat. Ann., tit. 43, §165-17.. 1

Regulations:

9 Pa. Code §9.106..... 4
34 Pa. Code §9.101-9.112..... 3
34 Pa. Code §9.102..... 3

Rules of Court:

Sup. Ct. R. 35.3..... ii

STATEMENT OF THE CASE

Pennsylvania's Prevailing Wage Act, Pa. Stat. Ann., tit. 43, §§165-1 through 165-17 (Purdon's 1992), governs the minimum wages to be paid to workers on public work projects. Petitioner claims that the Act, its regulations and an administrative order implementing it are pre-empted by Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. §1141(a) (ERISA).

1. Petitioner is Keystone Chapter, Associated Builders and Contractors, Inc., is a non-profit Pennsylvania corporation whose members are involved in the construction industry. C.A. App. 9, 66.[1] Respondent is Pennsylvania's Secretary of Labor and Industry, who is generally responsible for administering and

---

[1] C.A. App. refers to the appendix filed in the Court of Appeals.

enforcing the Act. C.A. App. 9; Pet. App. 13a, 14a.

The purpose of the Act "is to protect workers employed on public projects from substandard wages," Lycoming County Nursing Home v. Pennsylvania, 627 A.2d 238, 242 (Pa. Commw. Ct. 1993), by requiring that they receive at least the "minimum prevailing wages" as determined by the Secretary. Pa. Stat. Ann., tit. 43, §§165-5, 165-7. The Act specifically requires the Secretary, in determining the "minimum prevailing wages" to include "employer and employe contributions for employee benefits," ibid., and it is this provision which has given rise to this case.

In accordance with this provision, the wage rates established by the Secretary contain both a wage component and a benefits component. Pet. App. 14a.

The Act directs the Secretary to determine wage rates by locality and job classification, but neither the Act nor its implementing regulations, 34 Pa. Code §§9.101-9.112, give any further guidance on just how the benefit component of the wage rate is to be computed.[2]

Over the years the Secretary's approach to this issue has varied. Pet. App. 15a. Before 1988 the Secretary focused on the total contributions toward benefits without regard to the specific types of benefits funded or the specific

---

[2] Section 9.102 of the regulations does define contributions for employee benefits as:

> [F]ringe benefits' paid or to be paid, including payment made whether directly or indirectly, to the workmen for sick, disability, death, other than Workmen's Compensation, medical, surgical, hospital, vacation, travel expense, retirement and pension benefits. 34 Pa. Code §9.102.

amount contributed to each. App. 15a, n.5. Later the Secretary took a "line-item" approach, requiring employers to contribute to benefits in the type and in the amount the Secretary found to prevail in each locality. Ibid. At all times, however, employers could fulfill their obligation either by making contributions to employee benefits, or by paying their employees the equivalent of those contributions in cash. Pet. App. 14a; 9 Pa. Code §9.106.

In 1992, the Prevailing Wage Appeal Board, an administrative board charged with adjudicating grievances arising from the administration of the Act, decided that the line-item approach was no longer appropriate with regard to ERISA plans.

In response to the grievances of the petitioner and others, the Board issued a Declaratory Order requiring the Secretary

to give ERISA plans special consideration in determining compliance with the benefits component of the Act. Under the Order, contributions to ERISA plans were to be credited against the benefits component of the wage rate regardless of whether the benefits provided matched the categories the Secretary determined were prevailing. Pet. App. 17a-19a; C.A. App. 70-76.

2. Petitioner then brought this action seeking to have the Prevailing Wage Act, its regulations and the Declaratory Order declared pre-empted by ERISA.[3] On cross-motions for summary judgment the District Court entered summary judgment in favor of Petitioner and declared the Act, its regulations and the Declaratory Order

---

[3] Petitioner also raised constitutional claims which were not addressed by either the district court or the Court of Appeals.

invalid and unenforceable. Pet. App. 57a-58a.

The District Court reasoned that the Act could affect employee benefit levels by discouraging employers from paying more than the prevailing rate toward benefits. Pet. App. 54a. The District Court also concluded that as administered the Act required employers to calculate what they paid toward the wages and benefits which imposed ongoing administrative burdens that "fall within the parameters of ERISA plans." App. 53a-54a. Finally, the District Court observed that the Declaratory Order specifically mentioned ERISA plans and therefore, in the District Court's view, "related to" employee benefit plans under the holding of Shaw v.

Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). Pet. App. 53a-54a.[4]

3. The Court of Appeals affirmed the District Court's order with regard to the Declaratory Order, but reversed it with regard to the Act and its regulations. The Court of Appeals agreed that the Declaratory Order was pre-empted because it singled out ERISA plans for special treatment contrary to this Court's teaching in Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988). Pet. App. 25a-26a.

The Court of Appeals then turned to the Act and its regulations. It held that they were not pre-empted because they could reasonably be interpreted as not

---

[4] The district court went on to reject the Secretary's argument that the reference to contributions for fringe benefits was severable from the Act. Pet. App. 55a-56a.

requiring payment of benefits as part of the prevailing wage. Pet. App. 27a. Rather, the Court of Appeals concluded under the Act and regulations an employer had the option to pay the prevailing wage entirely in cash; or, to satisfy part of the wage through contributions to benefits of its own choosing. Pet. App. 27a-28a.

Interpreted in this way, the Court of Appeals reasoned that the statutory scheme regulated wages, an area traditionally governed by the States and not benefits. Pet. App. 28a. The Court of Appeals noted neither the Act nor its regulations were designed to affect employee benefit plans. Pet. App. 29a. Nor, did they single out benefit plans for special treatment. Pet. App. 29a.

The Court of Appeals also found that the statutory scheme did not predicate obligations solely upon benefit plans

covered by ERISA, as did the statute at issue in District of Columbia v. Greater Washington Board of Trade, 506 U.S. _____, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992). Pet. App. 29a-30a. The Court of Appeals noted benefit plans were but an example of the different kinds of benefits that could be considered in determining prevailing wage rates. Pet. App. 29a-30a.

The Court of Appeals also considered whether the Act and regulations had a sufficient indirect relation to ERISA plans to require pre-emption. Relying on Shaw v. Delta Airlines, 463 U.S. 85 (1983), the Court concluded that merely providing employers the option to satisfy part of their obligation to pay prevailing wages through benefit contributions did not require pre-emption. Pet. App. 37a-39a. The Court of Appeals noted providing the option does not require employers to

provide benefits nor does it favor the provision of certain benefits over others. Pet. App. 33a, 38a-40a.

Finally, the Court concluded that neither the Act nor its regulations dictated or restricted the choice of plans regarding their reporting and administration. App. 41a.

This petition followed.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

Petitioner argues that certiorari should be granted to resolve a conflict between the decision in this case and the decision of the Second Circuit in General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2d Cir. 1989). Pet. 13-20. The statutory schemes at issue in these cases were not the same; therefore, the resulting decisions do not present a conflict appropriate for resolution by this Court.

The General Electric case concerned whether the administration of New York's prevailing wage law was pre-empted by ERISA. Under New York's statute, contractors on public projects were required to pay their employees "supplements" or fringe benefits in

accordance with prevailing practices in the area where the project was located. General Electric, 891 F.2d at 27. If the fringe benefits offered by the contractor did not correspond with the prevailing supplements, the law required the contractor to bring them into conformity or to pay its employees the equivalent in cash. Id. The contractor was not permitted to substitute one form of supplement for another. Id. That is, the contractor did not receive any credit under the prevailing wage law for providing a benefit different from those found to be prevailing by New York's Commissioner of Labor. Id.

In striking down the New York statute, the Second Circuit noted that under ERISA "'private parties and not the government control the level of benefits.'" Id., quoting, Alessi v.

Raybestos - Manhattan, Inc., 451 U.S. 504, 511 (1981). The Court then pointed out that under New York's prevailing wage law the Commissioner of Labor determined the benefits to be provided. General Electric, 891 F.2d at 28. The Court found the law effectively determined the "type and amount of an employer's contributions to be a plan" and "the nature and amount of benefits" provided. Id. at 29.

In contrast, in this case the Court of Appeals specifically noted that Pennsylvania's Act does not require contractors to provide particular benefits at specified levels. App. 39a. Indeed, the Court made it clear that had Pennsylvania's law either required the payment of certain benefits over others or created a cash incentive to provide certain benefits, it would not survive scrutiny under ERISA. App. 39a, 40a. The

Court pointed to the General Electric case as an illustration of the sort of statutory scheme it believed would not pass muster. App. 40a, n.22. Thus, the decision in this case is consistent rather than in conflict with the Second Circuit's decision in General Electric.

The petition also mentions New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 14 F.3d 708 (2d Cir.), cert. granted, 63 U.S.L.W. 3291 (1994) and hints that the case which is pending before this Court shares a common issue with this matter. Pet. 7. Petitioner is wrong.

The New York case concerns a hospital rate setting statute that imposes rate differentials which may increase the cost of providing hospital benefits for some ERISA plans. This Court granted certiorari to determine whether a statute

that affects the cost to ERISA plans of providing benefits, "relates to" those plans and thus requires pre-emption of the statute. As the Third Circuit noted, the Prevailing Wage Act does not affect ERISA plan costs, it affects employers' wage costs. App. 36a-37a, n.18. Thus, the issue pending in the New York case bears no resemblance to the issue presented by this matter.

Finally petitioner also suggests that this Court should grant certiorari because the Third Circuit's decision conflicts with the reasoning of two district courts -- one in California and one in Michigan. Pet. 18. Assuming for purposes of argument that these conflicts exist, granting certiorari on this basis would be premature. It would remove the opportunity for the Courts of Appeals to address the issues and perhaps eliminate

the conflicts which appear to exist. Even if the asserted conflicts are not eliminated, the Courts of Appeals should have the opportunity to focus and develop the issues in a way that will assist this Court's review of them in the future. At this juncture, the issues have not sufficiently evolved in the lower courts to merit this Court's attention.

II. THE ISSUE PRESENTED BY THE PETITION WILL HAVE NO IMPACT ON THE LAW OF ERISA PRE-EMPTION BEYOND THE FACTS OF THIS CASE.

Petitioner proposes that this Court decide whether Pennsylvania's Prevailing Wage Act is related to employee benefit plans within the meaning of §514(a) of ERISA. While the resolution of this issue is important to Pennsylvania, there is no reason to believe that it will have any application beyond Pennsylvania.

As the preceding argument illustrated, whether the prevailing wage statutes of the various states survive ERISA pre-emption will often turn on the facts. The manner in which the law is administered certainly varies from state to state. Compare, General Electric, supra, and App. 27a-45a. These differences in administration may well call for different conclusions on pre-

emption which explains the different results in General Electric and this case. See also, National Elevator Industry, Inc. v. Calhoon, 957 F.2d 1555 (10th Cir. 1992) (administration of Prevailing Wage Law that favored participation in one type of ERISA plan, over another is pre-empted).

Cast as it is, the petition does not seek resolution of a legal issue of general importance. Rather, it invites this Court to review the decision of the Court of Appeals for error. As such it does not provide an appropriate basis for the exercise of this Court's discretionary jurisdiction.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals held that Pennsylvania could establish minimum wages to be paid on public projects and afford employers the option of satisfying a portion of the wage through contributions for employee benefits without intruding into the area pre-empted by ERISA. App. 11a. The Court then concluded that because the Prevailing Wage Act and its regulations could be implemented in such a fashion, they survived Petitioner's challenge. Pet. App. 27a.

This Court has repeatedly cautioned that where ERISA pre-emption is at issue the inquiry "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." Massachusetts v. Morash, 490 U.S. 107, 119 (1989), quoting, Fort

Halifax Packing Co. v. Coyne, 482 U.S. 1, 19 (1987). In both Morash and Fort Halifax, the Court recognized the states' traditional authority to regulate wages and upheld statutes exercising that authority against challenges based on ERISA pre-emption. Massachusetts v. Morash, supra (upholding Massachusetts' regulation of an employer's vacation pay policy); Fort Halifax Packing Co., supra (upholding a Maine statute requiring employers to provide severance pay). In line with those principles the Court of Appeals in this case concluded that the Prevailing Wage Act authorized the Secretary to establish a minimum prevailing wage without infringing on the area reserved for federal regulation by ERISA.

The Court of Appeals also properly concluded that Pennsylvania could afford

employers the option to pay the wages in cash or to satisfy a portion of the obligation through contributions to benefits of their own choosing, regardless of whether the benefits were offered through plans covered by ERISA. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), this Court recognized that while a state may not require employers to design their ERISA plans to conform to state law, it may permit them to choose between complying through a mechanism not covered by ERISA and complying through their ERISA plans.

Shaw concerned the validity of New York's disability benefits law that required employers to provide certain disability benefits. The Court concluded that the law fell within an exception to ERISA's pre-emption clause for benefit plans maintained solely to comply with a

state's disability law.[5] Id. at 106. The Court was then confronted with the argument that the law was nonetheless unenforceable with regard to employers who choose to provide disability benefits through multi-benefit ERISA plans. Id. While the Court agreed that the state could not require employers to modify their ERISA plans, it went on to hold that the state "may force the employer to choose between providing disability benefits in a separately administered plan and including state mandated benefits in its ERISA plan." Id. at 107-08. That is exactly what the Court of Appeals determined the Prevailing Wage Act could

---

[5] 29 U.S.C. §1003(b)(3) exempts from pre-emption:

> any employee benefit plan . . . maintained solely for the purpose of complying with applicable . . . disability insurance laws.

do. It could require employers to choose between paying the entire wage in cash or satisfying part of it through contributions to fringe benefits.

Finally, the Court of Appeals' decision is also consistent with District of Columbia v. Greater Washington Board of Trade, 506 U.S. _____, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992). That case involved a statute that required employers who provided health insurance for their employees to provide equivalent coverage for injured employees who were eligible for worker's compensation benefits. The Court held the law pre-empted by ERISA because its obligations were premised on the existence of ERISA-covered plans. Id. at _____, 121 L.Ed.2d at 520-21, 113 S.Ct. at 583-84. Absent such plans, the statute could not be applied.

The Court of Appeals correctly recognized that such is not the situation presented by the Prevailing Wage Act:

> In the absence of ERISA plans the Prevailing Wage Act could be meaningfully applied. The Act requires the Secretary to measure prevailing benefit contributions in a locality for a given class of worker. The Secretary would do so even if all of these were non-ERISA benefits -- that is benefits "payable on a regular basis from the general assets of the employer" . . . and that "create no need for an ongoing administrative program for processing claims and paying benefits."

Pet. App. 31a (citations omitted).

The Court also noted the act could be meaningfully applied if a contractor satisfied the benefits component of the wage by contributing to non-ERISA benefits or by paying its monetary equivalent. Id.

Thus, the decision of the Court of Appeals is consistent with prior decisions

of this Court concerning ERISA pre-emption.

CONCLUSION

For these reasons, the respondent asks the Court to deny the writ of certiorari.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

SUSAN J. FORNEY
Senior Deputy Attorney General

Office of Attorney General
15th Fl., Strawberry Sq.
Harrisburg, PA 17120
(717)783-1471

DATE: February 16, 1995